

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition for Penalty -)

Termination of Probation:)

BENSON MING-SHUN WU, M.D.)

Case No. 8002017035381

Physician's and Surgeon's)

OAH No. 2018060585

Certificate No. G 82299)

Petitioner)


DECISION AND ORDER

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on November 21, 2018.

IT IS SO ORDERED October 26, 2018.

MEDICAL BOARD OF CALIFORNIA

By: 
Kristina D. Lawson, J.D., Chair
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Penalty Relief –
Termination of Probation:

BENSON MING-SHUN WU, M.D.,

Petitioner.

Case No. 8002017035381

OAH No. 2018060585

PROPOSED DECISION

Heidi R. Weisbaum, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on July 13, 2018.

Jason J. Ahn, Deputy Attorney General, Department of Justice, State of California, represented the Office of the Attorney General.

Stewart Hsieh, Attorney at Law, Frye & Hsieh, represented petitioner Benson Ming-Shun Wu, M.D., who was present throughout the hearing.

The matter was submitted on July 13, 2018.

FACTUAL FINDINGS

License History

1. On May 1, 1996, the Medical Board of California (Board) issued Physician's and Surgeon's Certificate No. G82299 to Benson Ming-Shun Wu, M.D. (petitioner).
2. On November 6, 2014, an Accusation was filed by the Board alleging that on May 22, 2014, pursuant to a Consent Agreement and Order, petitioner was disciplined by the New York Board for Professional Medical Conduct. The discipline consisted of three (3) years of probation, censure and reprimand, and a \$10,000 fine, among other terms and conditions. The alleged conduct that led to the discipline was that on more than one occasion, between 2004 and 2008, petitioner wrote anesthesia

records indicating two different procedure dates when he knew that the two procedures had been performed on a single date.

3. On May 27, 2015, petitioner entered into a Stipulated Settlement and Disciplinary Order with the Board, placing petitioner's Physician's and Surgeon's Certificate Number G82299 on probation for a period of five (5) years, subject to numerous terms and conditions, including a 30-day suspension, a medical record-keeping course, a professional ethics course, a practice and billing monitor, and no solo practice, among other terms. The Board adopted the Stipulated Settlement and Disciplinary Order as its Decision and Order. The effective date of the Decision was July 24, 2015.

4. Probation on petitioner's California license is scheduled to end on July 24, 2020.

5. On July 26, 2017, petitioner filed a Petition for Penalty Relief with the Board requesting to terminate probation. This hearing followed.

Evidence Presented at the Hearing

6. Petitioner received his Bachelor's Degree in Biochemistry from Harvard, and attended medical school at Harvard Medical School, graduating in 1990. Thereafter, he did a one-year medical internship at Rhode Island Hospital, a three-year anesthesia residency at Massachusetts General Hospital, a one-year fellowship in cardiac anesthesia at Massachusetts General Hospital, a second one-year fellowship in pediatric anesthesia at Boston Children's Hospital, and a third one-year fellowship in pain management at New England Medical Center. In 1996, he joined North American Partners in Anesthesia (NAPA) and worked for them until 2008, providing anesthesia services at several hospitals in New York. Petitioner is board-certified in anesthesiology.

7. It was during the time petitioner worked for NAPA that he committed the conduct that led to the New York discipline. NAPA consisted of about 200 anesthesiologists and about 200 nurse anesthetists. In 2004, petitioner and four other anesthesiologists were assigned to provide anesthesia services for a gastroenterologist who performed endoscopies and colonoscopies in his office. In his narrative statement, petitioner described the practice as "a busy practice averaging 30 to 40 cases a day." His narrative also relates that the "insurance regulation require[d] a patient to come separately for upper endoscopy and colonoscopy in order for the gastroenterologist to be paid for both procedures." Petitioner stated that the gastroenterologist he worked with "deviated from the rules" for certain physicians who referred their relatives or other "special patients." For these patients, the gastroenterologist would perform both procedures on the same day, chart them as if performed on two different days, and asked the anesthesiologists to do the same. The gastroenterologist described it to petitioner as a "professional courtesy." Even though he knew it was wrong, petitioner (and the other four anesthesiologists) went along with it so as not to "upset the gastroenterologist and risk losing the business" for NAPA. Petitioner

thought the first time the gastroenterologist spoke to him about it was after he had been providing anesthesia services for him for about six months. Petitioner also stated it did not occur often so "it was easy to overlook."

8. In 2008, one of petitioner's colleagues who was uncomfortable with the practice spoke with the compliance officer of NAPA. All five anesthesiologists were suspended and subsequently fired or resigned from the company. There was also a New York State Department of Health investigation, which ended in 2014 with petitioner being disciplined pursuant to a consent agreement and order. The other four anesthesiologists were also disciplined. Petitioner did not know what, if anything, happened to the gastroenterologist.

9. In 2011, petitioner came to California for a couple of months to help a friend who had been diagnosed with colon cancer. During the time he was in California, he met his future wife. She wanted to live in California, so in 2014, after his New York case settled, he moved to California. Petitioner had been licensed in California since 1996 and knew if he moved here he would need to inform the Board about his New York discipline, which he did. He found work as a medical advisor to a start-up company that designed products to reduce patient falls and prevent the formation of pressure sores. He and his wife married in 2015, the year his probation in California started.

10. Petitioner resides and practices in Orange County, California. While on probation, petitioner has provided and continues to provide anesthesia services for plastic surgery. The plastic surgeons pay him for his services; he does not bill insurance companies. The surgeries are all performed outpatient. He works two days per week for one surgeon, two days per month for a second, and on an as-needed basis for a third. He does six to eight cases per week. He also is a medical advisor to Compwest Insurance, reviewing worker's compensation cases.

11. Petitioner testified that he was "very sorry for what [he] did." In his narrative, petitioner states he "used poor judgment in how to bill for services which included being lazy, 'going along with [the] practice of billing which was unethical,' and not having the 'backbone' to speaking [*sic*] up against the unethical behavior dealing with the billing practice." Petitioner testified that he knew he broke the law and did not want to make excuses. He wanted to emphasize that his "transgressions did not involve the quality of care delivered to any patient." But he understood it is not "sufficient to be good clinically, [he] must be ethical", as well.

12. Dr. Robert Hidalgo, Jr., petitioner's practice and billing monitor, testified on petitioner's behalf. Dr. Hidalgo has practiced anesthesiology in the Orange County area for 23 years, is board-certified, and currently does utilization review. Petitioner's case is the first time he has served as a practice and billing monitor. He did not know petitioner before being asked to be the monitor. At the time of the hearing, he had been petitioner's monitor for almost three years.

13. Dr. Hidalgo described petitioner as a highly-educated, highly-trained, humble physician. He met with petitioner every month for an hour and reviewed all his anesthesia records and the payments he received. The records were all legible and accurate and the patients all did well. He explained that he could tell from reviewing the records if the patient was stable throughout the procedure by, for example, checking to see if the patient's blood pressure remained steady or suddenly dropped. Dr. Hidalgo stated they would discuss six to eight cases every meeting. The more interesting cases were the ones where the patients had co-morbidities, for example, plastic surgery on a patient with diabetes or with an obese patient. He enjoyed discussing the cases with petitioner because of the depth of petitioner's knowledge.

14. Dr. Hidalgo was very familiar with the plastic surgery community in Orange County. He explained that petitioner worked only at outpatient surgery centers; he did no inpatient anesthesia. He knew two of the surgeons for whom petitioner worked and kept tabs on the other locations where petitioner practiced. Dr. Hidalgo visited one of the practice facilities, examined the anesthesia set-up, and took photos of the physician's credentials. He always asked petitioner if the surgery center or office was a safe place and petitioner told him about certain locations he declined. Dr. Hidalgo also stated that plastic surgery is generally not covered by insurance. As a consequence, most plastic surgery is on a cash basis. Therefore, even though Dr. Hidalgo was petitioner's billing monitor, there were no bills to insurance companies to review. Instead, Dr. Hidalgo reviewed petitioner's billing statements to the surgeons and the payments petitioner received from the surgeons, all of which Dr. Hidalgo found to be appropriate.

15. Dr. Hidalgo had nothing but good things to say about petitioner. He was impressed by petitioner's knowledge, skills and professional judgment. He saw no ethical issues, "absolutely none." He testified that he "would like to see petitioner's restrictions lifted."

16. Several physicians wrote letters in support of petitioner's request for early termination of probation.¹ All were aware of the reasons for his probationary status. All unequivocally support him.

Amy T. Bandy, M.D., the plastic surgeon for whom petitioner works two days per week, wrote that she has found petitioner

"to be not only an excellent anesthesia care provider, but a truly remarkable person in many ways. He consistently comes to our office with only the best and happiest demeanor and continues to brighten up everyone's day. He is trustworthy, dependable, reliable, as well as humble and he is a true joy to be around.

¹ The letters identified in paragraph 16 were received as administrative hearsay; they are admissible to corroborate, supplement, and explain petitioner's testimony. (Govt. Code, § 11513, subd. (c) and (d).)

He is always available to help in any situation and is great at teaching my nurses and OR tech anything medical that they have questions about. "Since meeting [petitioner], I have observed that he has the utmost integrity in every way. I wouldn't hesitate to entrust him with any aspect of my practice, as well as with my own life if I needed to go under anesthesia for any reason."

Lester L. Sacks, M.D., PhD., the Medical Director for Compwest Insurance, wrote that his "experience with [petitioner] has been stellar."

". . . [Petitioner] has demonstrated competence as a physician and I would not hesitate to recommend him for care of patients within his field of expertise. . . . [H]is medical judgment in the area of utilization management has been excellent demonstrating his ability to address cases with understanding and fairness."

Jonathan L. Tong, M.D., is the Chairman of the Board of MedicusTek USA, Inc., the biomedical start-up company where petitioner works as a medical advisor. Dr. Tong is also an anesthesiologist who has had a private practice in Orange County for over 17 years. He has known petitioner for seven years, has referred him to surgeons for work, and has observed him work at surgery centers. He states that petitioner:

"has done excellent care for patients . . . [and the feedback] from [the] surgeons and nurses [is] all excellent and high quality work with dedication and knowledge. They all complimented his professionalism and standard in his practice of medicine. He is considered to be a rare find."

Stephen J. Johnson, M.D., has known petitioner for over 20 years and considers him "an outstanding physician [who is] responsible, hard-working, and honest." Dr. Johnson states that if he had a complex case, petitioner "would be the 'go to guy.'" He recalled one of his own cases and wrote:

"[The case involved] a morbidly obese patient with many comorbidities including a paralyzed diaphragm in whom it was critical to have a working thoracic epidural and [petitioner], with his expertise in pain management, was able to place the epidural for me under fluoroscopy."

Dr. Johnson shared that when his wife needed anesthesia, he chose petitioner "from over fifty anesthesiologists." He described petitioner as "an extraordinary anesthesiologist who is a great asset to his patients."

17. Petitioner has complied with all the terms and conditions of probation. He served the 30-day suspension from August 9, 2015 through September 7, 2015. He attended the PACE Medical Record-Keeping course on July 30 and 31, 2015. He participated in the IMQ Professionalism Program (IMQ) on May 16 and 17, 2015, which involved a 20-hour program that included pre-course requirements as well as a two-day course on law and ethics and the practice of medicine. The certificate of completion he received from IMQ attests to the fact he completed the longitudinal portion of the program with the six and twelve-month follow-ups. He filed his quarterly declarations, met with his probation monitor, and as stated above, met regularly with his practice monitor. He is also current with all his probation costs.

18. Petitioner seeks to terminate probation because, as stated above, he has complied with all the terms and conditions of his probation, he has been under constant monitoring, and he has "learned some hard and difficult lessons which have impacted [his] whole being in a positive manner." He does not consider himself a danger to his patients. He believes he has improved himself through the courses he has taken and considers himself a productive member of society. He has found the ethics book from the IMQ course to be very valuable and has referred to it more than once since taking the course.

19. Petitioner also stated the experience of being disciplined has caused a "loss of face" and has been "shameful" for him. Petitioner testified credibly in a humble, honest and forthright manner. He did not blame anyone other than himself and took responsibility for his actions.

20. The Office of the Attorney General thought that petitioner could benefit from the additional two years of probation but recommended a billing course if petitioner's probation were terminated.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. In a proceeding to terminate probation, the burden at all times rests on the petitioner to prove he has rehabilitated himself and is entitled to restoration of his license. (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) A person seeking reinstatement of a revoked license must present strong proof of rehabilitation, and the showing of rehabilitation must be sufficient to overcome the former adverse determination. In reinstatement cases, the standard of proof is clear and convincing evidence. (*Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d, 308, 315-316.) An individual seeking early termination of probation must meet the same standard.

Statutory and Regulatory Authority

2. Business and Professions Code section 2307 provides in part:

(a) A person . . . whose certificate has been . . . placed on probation, may petition the board for . . . modification of penalty, including modification or termination of probation.

(b) The person may file the petition after a period of not less than the following minimum periods have elapsed from the effective date of . . . the decision ordering that disciplinary action:

[¶] . . . [¶]

(2) At least two years for early termination of probation of three years or more.

[¶] . . . [¶]

(c) The petition shall state any facts as may be required by the board. The petition shall be accompanied by at least two verified recommendations from physicians and surgeons licensed in any state who have personal knowledge of the activities of the petitioner since the disciplinary penalty was imposed.

[¶] . . . [¶]

(e) The . . . administrative law judge hearing the petition may consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner's activities during the time the certificate was in good standing, and the petitioner's rehabilitative efforts, general reputation for truth, and professional ability. . . .

Relevant Factors in Determining Rehabilitation

3. Rehabilitation is a state of mind. The law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) The amount of evidence of rehabilitation required to justify admission varies according to the seriousness of the misconduct at issue. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1086.)

Cause Exists to Terminate Probation

4. Cause exists under Business and Professions Code section 2307 to grant the petition and to terminate probation. Petitioner established by clear and convincing evidence that termination of probation is warranted and would not be against the public interest. At the time of the hearing, he had been on probation for three years. Petitioner has taken full responsibility for his conduct and the actions that resulted in his being placed on probation. The conduct occurred more than 10 years ago and did not involve the quality of care he provided. Indeed, the clear and convincing evidence showed that petitioner is a highly-skilled, extremely competent and well-liked anesthesiologist.

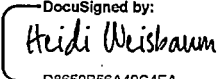
5. There is no basis for requiring a billing course as recommended by the Office of the Attorney General. The cause for discipline in New York stemmed from petitioner's false charting. In that action he was charged with a failure to maintain accurate records and making false records. The cause for discipline here was based solely on the New York action; no additional charge of erroneous billing was alleged. Petitioner did not bill the patients for his services. Nor was any evidence presented to suggest petitioner erroneously or falsely billed for his services.

6. Petitioner has been on probation in New York and California for a combined period of more than four years. No additional probationary period is necessary to protect the public interest. Termination of petitioner's probation is appropriate and warranted.

ORDER

The petition for penalty relief filed by Benson Ming-Shun Wu, M.D., for early termination of probation on his Physician's and Surgeon's Certificate No. G82299, is granted.

DATED: July 30, 2018

DocuSigned by:

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HEIDI R. WEISBAUM
Administrative Law Judge
Office of Administrative Hearings